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April 13, 2009

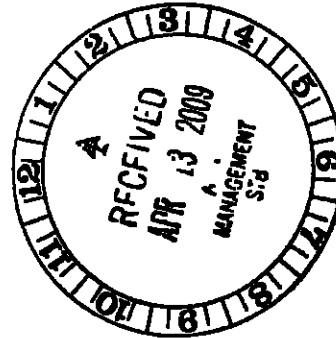
BY HAND

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings

APR 13 2009

Part of
Public Record



Re Docket No. 42113, Arizona Electric Power Cooperative, Inc. v
BNSF Railway Company and Union Pacific Railroad Company

Dear Secretary Quinlan:

Enclosed for filing please find the original and ten copies of Union Pacific's Reply to AEPCO's First Motion to Compel Discovery.

An additional paper copy of this filing is also enclosed. Please return a date-stamped copy to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

Enclosure

cc Samuel M. Sipe, Jr., Esq.
Robert D. Rosenberg, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

Complainant,

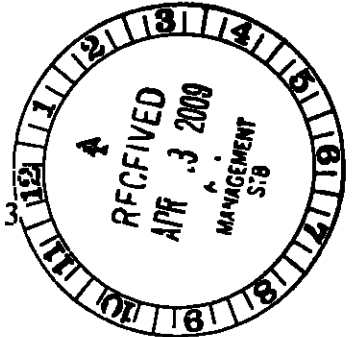
v

BNSF RAILWAY COMPANY and

UNION PACIFIC RAILROAD
COMPANY,

Defendants

Docket No 42113



**UNION PACIFIC'S REPLY
TO AEPCO'S FIRST MOTION TO COMPEL DISCOVERY**

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April 13, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA ELECTRIC POWER)	
COOPERATIVE, INC)	
)	
Complainant,)	
)	
v)	Docket No 42113
)	
BNSF RAILWAY COMPANY and)	
)	
UNION PACIFIC RAILROAD)	
COMPANY,)	
)	
Defendants)	
)	

**UNION PACIFIC'S REPLY
TO AEPCO'S FIRST MOTION TO COMPEL DISCOVERY**

The Board should deny the motion to compel filed by Arizona Electric Power Cooperative, Inc ("AEPCO") against Union Pacific Railroad Company ("UP") AEPCO seeks discovery to pursue its claims regarding the coal movements addressed in UP's Motion to Hold Proceedings in Abeyance, and the Board should deny AEPCO's motion for the same reason it should grant UP's motion Board precedent requires the agency to suspend proceedings in rate disputes in which the reasonable possibility of a rate contract is raised in some minimal evidentiary fashion *See, e g , Toledo Edison Co v Norfolk & W Ry , 367 I.C.C 869, 871 (1983), PSI Energy, Inc v CSX Transp , Inc (Motion to Modify Procedural Schedule), STB Docket No 42034 (STB served Sept 11, 1998)*

Moreover, AEPCO is wrong to suggest that the immediate production of the requested data would be more efficient for the parties UP is not withholding any data that

AEPCO needs to pursue the portions of its complaint that are not subject to the contract dispute, but UP would be required to expend significant resources in expanding its production efforts to encompass the hundreds of miles of additional lines that are implicated by AEPCO's motion – resources that would be entirely wasted if UP prevails in its contract dispute with AEPCO

Finally, AEPCO would not be disadvantaged were it to prevail in the contract dispute and subsequently bring a separate case challenging UP's single-line rates from origins in Colorado and Wyoming's Southern Powder River Basin ("SPRB") As the Board explained in addressing a similar complaint that challenged both single-line and joint-line rates, AEPCO's stand-alone cost presentation to test UP's single-line rates would necessarily be different from the presentation it uses to challenge joint rates charged by UP and BNSF Railway ("BNSF") *See Ariz Elec Power Coop v Burlington N & Santa Fe Ry*, STB Docket No 42058 (STB served Aug 20, 2002)

I. Discovery Regarding Movements Subject To The Contract Dispute Between UP And AEPCO Should Not Proceed While The Dispute Remains Pending In Court.

More than a month ago, UP filed a motion to hold in abeyance the portion of this proceeding in which AEPCO seeks to require UP to establish common carrier rates for coal shipments from UP-served mines in Colorado and the SPRB *See Union Pacific's Motion to Hold Proceedings in Abeyance*, filed Feb 24, 2009 UP explained that those shipments were governed by a contract between UP and AEPCO, that UP had filed a declaratory judgment action to vindicate its contractual rights, and that Board precedent required the agency to suspend proceedings regarding those shipments until a court resolves the dispute *See id* at 3-11 The declaratory judgment action is currently proceeding before the U S District Court for the District of Arizona *See Letter from Michael L Rosenthal, Counsel for UP, to Anne E Quinlan, Secretary, Surface Transportation Board* (Apr 2, 2009)

AEPCO argues that it is entitled to discovery regarding UP-served origins in Colorado and the SPRB even while UP's motion remains pending before the Board, but its reliance on the Board's general rule against automatically staying rate proceedings is unavailing in light of the Board's more specific rule that the agency will suspend proceedings when there is a genuine dispute about the existence of a rail transportation contract. *See Toledo Edison*, 367 I C C at 871, *PSI Energy* at 3. Contrary to AEPCO's insinuation, UP did not file some random, "obstructionist motion." AEPCO Motion at 9. UP filed a motion based on established precedent that requires the Board to hold proceedings in abeyance when parties to a rate case are disputing the existence of a contract, and the motion was directed only to those origins covered by contract and therefore beyond the Board's jurisdiction. *See Union Pacific's Motion to Hold Proceedings in Abeyance* at 7-8, *see also* 49 U S C § 10709(c).

AEPCO is also wrong when it implies that UP is asserting a right to an "automatic stay." AEPCO Motion at 7. UP expressly asked the Board to hold in abeyance the portion of this proceeding involving movements from origins in Colorado and the SPRB, and that request naturally includes holding in abeyance any discovery involving those movements. Board precedent establishes that, pending action by the court, "[d]iscovery will also be held in abeyance." *W. Res., Inc. v. Atchison, Topeka & Santa Fe Ry.*, STB Docket No. 41604 (STB served May 31, 1996), at 2 (staying rate complaint proceedings, including discovery, pending state court resolution of contract issues).¹ Indeed, the point of allowing UP and similarly situated parties to seek relief in these circumstances would be defeated if they were required to continue

¹ UP's motion thus also served as a motion seeking a protective order that discovery not be had. *See* 49 C F R § 1114.21(c)(1). A party that filed a motion for a protective order should not be required to respond to discovery while its motion seeking protection from such discovery is being addressed by the Board.

litigating their rate cases while their motions remained pending before the Board. *See PSI Energy* at 3 (“The resources of the Board and the carriers would be wasted if we were to proceed with a complaint . . . and the court were later to uphold the carriers’ interpretation of the contract.”)

II. Allowing Discovery To Proceed Would Be Inefficient And Would Impose Significant Burdens On UP.

The Board should not be swayed by AEPCO’s suggestion that the immediate production of the requested data would be more efficient for the parties. AEPCO suggests that it might be more efficient for AEPCO to process all of UP’s traffic data at one time, but the stand-alone cost presentation that AEPCO uses to test joint UP/BNSF rates from mines served by BNSF will necessarily be different from the presentation that AEPCO uses to test single-line rates from mines served by UP. *See Ariz. Elec. Power Coop.* at 7-8.

Moreover, in connection with AEPCO’s challenge to the joint UP/BNSF rates, UP will necessarily be producing any data that might be relevant to both that case and any case challenging UP’s single-line rates. For example, AEPCO observes that some UP traffic that would be at issue in a case challenging UP single-line rates from origins in Colorado and the SPRB might be used as cross-over traffic in both stand-alone cost presentations. AEPCO overlooks, however, that UP’s responses to AEPCO’s discovery requests confirmed that UP will produce such cross-over traffic data. UP will be producing full origin-to-destination data for any traffic that moves over any portion of its lines that AEPCO interline traffic uses, as well as all of the additional data required for ATC analysis, in connection with AEPCO’s challenge to the joint

UP/BNSF rates² Similarly, UP will be producing any data regarding portions of its physical plant that might be used in both presentations If AEPCO believes it is efficient to do so, it may use all of this data to prepare in advance for the possibility that it will be allowed to pursue a challenge to UP rates from origins in Colorado and the SPRB The only data that UP will not be producing are data that would be relevant *only* in a challenge to single-line rates from UP-served mines in Colorado and the SPRB³

Finally, AEPCO is wrong to suggest that producing the entire potential universe of data at once would be less burdensome for UP See AEPCO Motion at 10 n 7 UP would face substantial additional burdens in responding to AEPCO's requests for information regarding rail lines that would be relevant only in a proceeding involving coal moving from UP-served mines in Colorado and the SPRB to the Apache Station

In connection with AEPCO's challenge to the joint UP/BNSF rates, UP will be searching for and producing extensive, detailed, line-specific information regarding its operations south of Pueblo, Colorado, where it interchanges the Powder River Basin coal destined to the Apache Station with BNSF⁴ If AEPCO has its way, UP would be required to

² To be absolutely clear, AEPCO is wrong to the extent it suggests that UP's refusal to produce information regarding origins in Colorado and the SPRB will prevent AEPCO from performing ATC analyses required for its challenge to the joint UP/BNSF rates UP has agreed to produce origin-to-destination traffic data for traffic that shares the UP lines used to deliver coal moving under joint UP/BNSF rates to AEPCO, and it has agreed to provide system-wide density and timetable data, so AEPCO can perform any necessary ATC analyses

³ The Board should not accept AEPCO's undocumented, unverified assertion that its inability to obtain discovery immediately will increase its costs by "*many hundreds of thousands of dollars*" AEPCO Motion at 10 UP suspects that AEPCO will save significant counsel and consultant fees by not proceeding with discovery and data analysis in a case that will become irrelevant when UP prevails in its declaratory judgment action – as will UP

⁴ See, e.g., Complainant's First Requests for Admissions, Interrogatories, and Requests for Production of Documents (Exhibit 1 to AEPCO's Motion), Request for Production ("RFP") No. 24 (helper service information), RFP No. 26 (car inspection information), RFP No. 27 (continued)

expand its line-specific search and production efforts to cover the hundreds of miles of UP lines from Pueblo north to Denver and then west to the UP-served mines on the Craig Branch and North Fork Branch, and from Denver north to the UP-served mines in the SPRB. The resources required to undertake these additional, line-specific discovery efforts would be significant. The line-specific nature of the data at issue means that there are few efficiencies to be gained from producing a broader universe of data at the same time. Thus, substantial UP resources “would be wasted” if the Board were to require discovery relating to origins in Colorado and the SPRB “and the [Arizona] court were later to uphold [UP’s position] ” *PSI Energy* at 3.

CONCLUSION

The Board should deny AEPCO’s motion to compel, and it should hold in abeyance the portion of this proceeding in which AEPCO seeks to require UP to establish common carrier rates for coal shipments from UP-served mines in Colorado and the SPRB to Apache Station until a court determines whether those shipments are subject to a rail transportation contract between UP and AEPCO.

(studies of operations), RFP No. 28 (train lists and profiles), RFP No. 49 (fueling location information), RFP No. 50 (fueling agreements), RFP No. 63 (maintenance of way and construction records), RFP No. 64 (information regarding track testing), RFP No. 67 (records regarding governmental contributions to construction projects), RFP No. 68 (land valuation maps), RFP No. 69 (information regarding donated rights of way), RFP No. 70 (information regarding sale or appraisal of land), RFP Nos. 71 & 72 (information regarding grading and construction activities), RFP No. 73 (information regarding culverts and drainage pipes), RFP No. 74 (information regarding construction projects), RFP Nos. 78-80 (information regarding bridges), RFP Nos. 89-90 (information regarding highway and railroad crossings), and RFP No. 91 (information regarding fencing).

Respectfully submitted,



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April 13, 2009

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 13th day of April, 2009, I caused copies of Union Pacific's Reply to AEPCO's First Motion to Compel Discovery to be served by hand and by e-mail on:

William L. Slover
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